In Lawrence v. Texas, 539 U.S. 558 (2003), the Supreme Court ruled 6-3 that a Texas statute criminalizing certain sexual conduct between two persons of the same sex violates the Due Process Clause.

The following excerpt is from Justice Scalia’s dissent.

… Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school must seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See Romer, supra, at 653.

One of the most revealing statements in today’s opinion is the Court’s grim warning that the criminalization of homosexual conduct is “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” Ante, at 14. It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as “discrimination” which it is the function of our judgments to deter. So imbued is the Court with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously “mainstream”; that in most States what the Court calls “discrimination” against those who engage in homosexual acts is perfectly legal; that proposals to ban such “discrimination” under Title VII have repeatedly been rejected by Congress, see Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H. R. 5452, 94th Cong., 1st Sess. (1975); that in some cases such “discrimination” is mandated by federal statute, see 10 U.S.C. § 654(b)(1) (mandating discharge from the armed forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such “discrimination” is a constitutional right, see Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one’s fellow citizens is one thing, and imposing one’s views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts—or, for that matter, display any moral disapproval of them—than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change. It is indeed true that “later generations can see that laws once thought necessary and proper in fact serve only to oppress,” ante, at 18; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best. …